Supreme Court, U.S.
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No.: _____

In the
Supreme Court of the United States

RAYMOND RUSCITO, SR., MARTHA RUSCITO, CONSUMER LAWNMOWER & COAL COMPANY, INC. and CONSUMER SALES, INC.,

Petitioners,

-against-

SWAINE, INC., JOHN SWAINE, ADAM EBERHARDT, ERNEST MARTIN EBERHARDT, WILLIAM EBERHARDT, PYGMY HOLDING CORP., and the TOWN OF SMITHTOWN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTIONS PRESENTED

1. Does an owner of land devoted to a business use have a Constitutional right of access under the Fourteenth Amendment to the State courts for protection from nuisances which might destroy or damage his business?

2. Does such an owner having shown the State court an invasion of his substantative proprietary right protected by the Fourteenth Amendment have a Constitutional right under the Seventh Amendment as incorporated by the Fourteenth Amendment to a jury determination on the issue?

PARTIES

The caption of the case contains the names of all the petitioners. Consumer Lawnmower and Coal Company, Inc., and Consumer Sales Inc., have no parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs-appellants in the court below respectfully petition on this court for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York in the case at bar.

DECISIONS BELOW

All decisions are entitled *Ruscito v. Swaine, Inc., et al.* The decision of the Supreme Court, Suffolk County, dismissing plaintiff's complaint is unreported, Appendix A. The order of the Appellate Division, Second Department affirming the decision of Supreme Court (17 AD3d 560, 793 NYS2d 475) is appended at Appendix B. The order of the New York Court of Appeals denying leave to appeal is appended at Appendix C.

JURISDICTION

The New York Court of Appeals denied leave to appeal from the decision of the Appellate Division: Second Department on June 29, 2005. This court has jurisdiction under 28 USC 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES

AMENDMENT 7

[Trial by jury in civil cases]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT 14

Sec. 1. [Citizenship - Due Process of law - Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is the case of Mount Trashmore.

Petitioners and Respondents were abutting commercial landowners along bustling Smithtown Boulevard at the intersection with Mon Repos Lane in Smithtown, New York. Over the years there were intermittent disputes over respondent's devotion of their land to a Hogan's Alley, collecting at various times dirt and stumps, the rotten hulks of buses, cesspool fill and hills of overgrown weeds and rubble together with an abandoned ice machine.

The principal point of dispute was that the "complete disarray...[of] junk all over the place, piles of dirt, chassis from the trailers...[blocked] the line of sight [to plaintiff's business] from the corner."

The issue boiled to a head when respondent Eberhardt sold off his holdings to respondent Swaine. Swaine swiftly evicted petitioner Ruscito from a narrow wedge along Smithtown Boulevard, filled the wedge with a wall of dirt 20 feet high; high enough to swallow a car, and obstructed Rusicito's property with a palisade fence. To be sure to wall in the Ruscitos, Swaine replaced the wooden slats with corrugated metal to complete the image.

The photos in evidence show a mountain of rubble dubbed Mount Trashmore, high enough to block view from the road not only of petitoner's business, but also of the nearby intersection of busy Smithtown Boulevard, but also of the intersection of Mon Repos Lane creating a safety hazard to plaintiffs and other foreseeable users of the roads.

As every day became a new challenge of impish tricks, the Ruscitos were eventually forced to sell the business at a loss.

Complaints to the Town and County of Zoning and Health code violations were to no avail. That part of plaintiffs' case, brought to recover damages of the Town of Smithtown for failure to enforce various provisions of the Town Code to wit, failure to create a buffer zone, erection of the Great Wall of Mount Trashmore up to the very intersection of Smithtown Boulevard with Mon Repos Lane was withdrawn after the Town moved to dismiss for lack of any legal duties to enforce local ordinances.

The Constitutional issue was implicitly in the forefront at every stage as this was a dispute over property rights.

At a trial before the Supreme Court, Suffolk County,

respondents moved to dismiss for failure to make out a prima facie case. The court ruled that since a claimant in a condemnation case could not get an award for loss of an obstructed view of property, no action could be maintained for private nuisance. Essentially the trial court reasoned there might be a right to see out but not to see in. The Appellate Division affirmed on this basis and leave to appeal was denied.

REASONS FOR GRANTING THE WRIT

In *Baltimore and Potomac RR v. Fifth Baptist Church* (108 US 317, 331-332, 27 Law Ed. 739, 741, 2 Sct. 719), this court restated the classical law of nuisance. An authorization to utilize a premises is not a warrant to "subject others to physical discomfort and annoyance in the quiet use and enjoyment of property." In *Baltimore and Potomac RR vs. Fifth Baptist Church* (supra) case, a railroad, having received permission from Congress to operate a railway system in the Capital set up what appears to be a round house near the Fifth Baptist Church and, while it reduced its traffic on Sundays, had whistles tooting, engines running and trains parked in front of the Church disrupting egress and ingress to services as well as religious observances themselves. The high court saw no difference between the right of egress from the right of ingress and deemed both an essential right of the freeholder, the Fifth Baptist Church, whose property rights and interests the law deemed worthy of protection.

The distinction drawn in the instant case essentially between the right to see out and the right to see in seems to create an anomaly in cutting the business run by petitioners from their line of sight customers likened to an attempt to limit free speech to a right to be seen, yet not heard. In severing the link between petitioners and their customers and departing from

the provident decision rendered in Fifth Baptist Church case, the state has eviscerated a part and parcel of the right ownership of property prohibited in the very words of the Fourteenth Amendment which prohibits a taking of a property interest without due process of law.

In petitioner's case the right to demand protection of a property interest guaranteed by the Fourteenth Amendment suffered but the right to procedural due process guaranteed by that Amendment incorporating the Seventh Amendment's right to a jury trial was destroyed.

The Seventh Amendment preserves a jury trial if the amount in controversy exceeds $20. Is this protection applicable to the states as a matter of due process provided in the Fourteenth Amendment?

Only two recent cases have touched the issue. *Robertson v. Apuzzo* (170 Conn. 367, 365 A2d 824, 831) and *Lyton v. Great Lakes Dredge* (964 F2d 1480, 1488 [5th cir]) without much exploration of rationale. Robertson relied upon a footnote in a dissent in *Colgrave v. Batten* (413 US 149, 169, fn 4, 37 Led 2d 522, 536, 93 Sct. 2448). The footnote is not of much guidance as it speaks to an issue not in controversy in the case before the court.

Justice Harlan believed that due process meant due process in law in the context of the Fourteenth Amendment according to the law of the land, i.e. observance of the specific procedures which the legislature had created. see Harlan, J. dissenting in *Duncan v. Louisana*, 391 US 145, 20 LEd 2d 491, 88 SCT. 1444. Justice Black on the other hand believed that the protection meant exactly what it said and carried with it the applicability of all eight Bills of right as a protection against